MOTION FILED
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No. 92-267

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

UJB FINANCIAL CORP., et al.,

Petitioners,

v.

IRWIN SHAPIRO, ROBERT BASSMAN,
JEROME KATZ, NORMAN SALSITZ,
JEAN LEE and CHAPPAQUA FAMILY TRUST,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF DEAN WITTER REYNOLDS, INC., MORGAN STANLEY & CO. INCORPORATED, PAINEWEBBER INCORPORATED, WERTHEIM SCHRODER & CO. INCORPORATED AND THE SECURITIES INDUSTRY ASSOCIATION, IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Dean Witter Reynolds Inc., Morgan Stanley & Co. Incorporated, PaineWebber Incorporated and Wertheim Schroder & Co. Incorporated, registered broker-dealers engaged in the business of underwriting securities, hereby respectfully move for leave to file the attached brief as *amici curiae* in support of the Petition for Certiorari filed by UJB Financial Corp., et al. The Securities Industry Association, a trade association representing the collective interests of over 600 securities firms headquartered throughout the United States and Canada, also joins this motion.

The consent of all parties to this action for the filing of the attached *amicus curiae* brief has been requested. The consent of the attorneys for the petitioners has been obtained. The attorneys for the respondents have withheld consent.

The complaint in *Shapiro* v. *UJB Financial Corp.*, 964 F.2d 272 (3d Cir. 1992), is typical of those in dozens of cases brought since the onset of the national recession. It alleges that the bank deliberately overstated its financial condition by providing inadequate reserves for loan losses. The complaint, like others of its type, points to an increase in loan loss reserves from one reporting period to the next and alleges, with little or no factual elaboration, that the reserves established in the earlier periods were fraudulently understated.

Complaints of this type are not limited to the banking industry, nor to charges relating to loan loss reserves. Substantial numbers of analogous complaints have been filed against both issuers and underwriters of securities in the wake of disappointing performance by companies that have made public offerings of securities.

As securities industry participants highly susceptible to claims of "fraud by hindsight,"[1/] *amici* fear that if the decision below is allowed to stand, ordinary business reverses would expose issuers and

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[1/] *Denny* v. *Barber*, 576 F.2d 465, 470 (2d Cir. 1978).

underwriters to burdensome proceedings absent any evidence of, or even basis for charging, wrongdoing. Such suits would create a serious impediment to the capital-raising process which in turn would have an unwarranted and deleterious effect on the operation of the U.S. capital markets. Reversal of the Third Circuit's decision in this case is essential to maintaining a proper balance among the rights of all participants in the marketplace.

Amici seek to submit the attached brief in support of certiorari to emphasize the importance of the issues to American business and to describe the impact of the Third Circuit's decision on the capital markets.

Dated: August 19, 1992

Respectfully submitted,

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2A James W. Moore & Jo D. Lucas, *Moore's Federal Practice* ¶ 9.03[1] (1991) 7

5 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure: Civil 2d* § 1298 (1990) 7

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INTERESTS OF *AMICI*

Dean Witter Reynolds Inc., Morgan Stanley & Co. Incorporated, PaineWebber Incorporated and Wertheim Schroder & Co. Incorporated, registered broker-dealers engaged in the business of underwriting securities, respectfully submit this brief, as *amici curiae*, in support of petitioner. The Securities Industry Association, a trade association representing the collective interests of over 600 securities firms headquartered throughout the United States and Canada, also joins this brief as *amicus curiae* in support of petitioner.

Amici are concerned that the standard set forth in this case as applicable to complaints asserting securities fraud will have an unwarranted and deleterious effect on the operation of the U.S. capital markets. Securities underwriters are highly susceptible to claims of "fraud by hindsight"[1/]—assertions that disappointing performance by companies whose securities they underwrite demonstrates that prospectuses and other disclosure documents "must have been" fraudulent. *Amici* fear that if the decision below is allowed to stand, underwriters and other participants in the securities markets will face potentially enormous litigation costs as a result of simple business reverses rather than of any wrongdoing. This is particularly so in cases where, as here, the allegations of fraud essentially amount to a claim that things did not turn out as everyone would have wished. Reversal of the Third Circuit's decision in this case is essential to maintaining a proper balance among the rights of all participants in the marketplace.

Amici support the grant of the petition for certiorari for the reasons stated in the petition. They submit this brief in support to emphasize the importance of the issues to American business and to describe the impact of the Third Circuit's decision on the capital markets.

[1/] *Denny* v. *Barber*, 576 F.2d 465, 470 (2d Cir. 1978).

SUMMARY OF ARGUMENT

The Third Circuit's decision in *Shapiro* v. *UJB Financial Corp.*, 964 F.2d 272 (3d Cir. 1992), conflicts with decisions of other circuits on a question of exceptional importance: the standard for pleading fraud under Fed. R. Civ. P. 9(b).[2/] Resolution of this conflict is necessary now because of the uncertainty it creates in the lower courts and because of the violence the *Shapiro* decision does to the fundamental principles underlying Rule 9(b). Moreover, permitting allegations of securities fraud to proceed to discovery without requiring any factual basis for the claims of fraud, as the Third Circuit has done here, is at odds with the policy underlying Rule 11.[3/]

Shapiro is but one of dozens of cases brought in the wake of recent increases in bank loan loss reserves occasioned by the national recession. It alleges that the bank deliberately overstated its financial condition by providing inadequate reserves for loan losses. The complaint, like others of its type, points to an increase in loan loss

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[2/] Rule 9(b) provides:

> **Fraud, Mistake, Condition of the Mind.** In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

[3/] Rule 11 provides in pertinent part:

> **Signing of Pleadings, Motions, and Other Papers; Sanctions.** . . . The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

reserves from one reporting period to the next and alleges, with little or no factual elaboration, that the reserves established in the earlier periods were fraudulently understated.

Complaints of this type are not limited to the banking industry. Substantial numbers of analogous complaints have been filed against both issuers and underwriters in the wake of disappointing performance by companies that have made public offerings of securities. The Seventh Circuit aptly described this genre of litigation:

> The story in this complaint is familiar in securities litigation. At one time the firm bathes itself in a favorable light. Later the firm discloses that things are less rosy. The plaintiff contends that the difference must be attributable to fraud. "Must be" is the critical phrase, for the complaint offers no information other than the differences between the two statements of the firm's condition. Because only a fraction of financial deteriorations reflects fraud, plaintiffs may not proffer the different financial statements and rest. Investors must point to some facts suggesting that the difference is attributable to fraud.

DiLeo v. *Ernst & Young*, 901 F.2d 624, 627 (7th Cir.), *cert. denied*, 111 S. Ct. 347 (1990).

The Third Circuit's opinion in *Shapiro* is of fundamental importance in light of the increase in "fraud by hindsight" securities litigation. The Courts of Appeals for the First, Second and Seventh Circuits have blocked these claims by holding that such complaints are insufficient under Rule 9(b) unless they specify "the who, what, when, where, and how"[4] of the alleged false representations. The *Shapiro* decision, however, would allow plaintiffs alleging fraud to sue first and ask questions later. Moreover, *Shapiro* is likely to lead to extensive forum-shopping as securities plaintiffs seek the forum with the most permissive rule on this point.

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[4] *DiLeo*, 901 F.2d 624, 627; *Romani* v. *Shearson Lehman Hutton*, 929 F.2d 875, 878 (1st Cir. 1991); *Denny*, 576 F.2d at 470.

The Supreme Court's authoritative voice is necessary here to provide guidance to and a uniform rule for the lower courts. In light of the considerable number of suits pending in the lower courts which turn on the construction of Rule 9(b) and the recurring nature of this issue, there is an immediate need to dispel the uncertainty created by the Third Circuit's departure from settled principles.

Review is necessary also because the standard applicable to pleadings asserting fraud is of fundamental importance, not only to the banking industry directly involved in *Shapiro*, but to the functioning of the capital markets generally. In any market some percentage of companies will disappoint or even founder, most often as a result of mismanagement or economic decline rather than fraud. If the standard for pleading fraud enunciated by the Third Circuit in *Shapiro* were allowed to stand, the tide of baseless lawsuits brought by disappointed investors in an effort to shift their losses to deeper pockets would threaten to break the dikes. Ordinary business reverses would expose issuers and underwriters to burdensome proceedings absent any evidence of wrongdoing. Due to the magnitude of the potential costs and risks associated with litigating securities fraud cases, especially class actions, many such actions are settled before trial, often with little regard to the merits of the case. The *Shapiro* standard therefore threatens to create a type of "no-fault" insurance against market losses, the costs of which will adversely affect the growth and development of emerging companies.[5] The writ should issue.

ARGUMENT

I.

REVIEW IS NEEDED TO RESOLVE THE CONFLICT AMONG THE CIRCUITS

Under *Shapiro*, a plaintiff lacking facts sufficient to state a Rule 10b-5 claim for fraudulent understatement of loan loss reserves nevertheless may avoid dismissal on Rule 9(b) grounds merely by pleading that the requisite facts lie within the exclusive control of the defendant and

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[5] *See DiLeo*, 901 F.2d at 627.

that unsuccessful efforts have been made to obtain them. *Shapiro*, 964 F.2d at 285. Significantly, the *Shapiro* analysis would apply not only to claims alleging misrepresentations with regard to loan loss reserves, but to all fraud claims where facts supporting allegations of fraud may be claimed to lie within the sole control of the defendants and where plaintiff can delineate his unsuccessful attempts to uncover such facts.[6/] Thus, *Shapiro* holds that a securities plaintiff may unleash the costs and burdens of modern class action litigation without any basis for supposing that fraud occurred save the fallacious assumption that the fact of a business setback demonstrates that its future occurrence was known earlier and deliberately concealed.

Shapiro is at odds with the fundamental purposes of Rule 9(b): (i) to require specificity in allegations of fraud so that defendants have notice of the particular misconduct which is alleged to constitute the fraud and can prepare their defense, (ii) to inhibit the filing of a complaint as a pretext for the discovery of unknown wrongs, and (iii) to protect potential defendants—especially professionals whose reputations in their fields of expertise are most sensitive to baseless aspersions—from the harm that comes from being charged with the commission of fraudulent acts.[7/] Rule 9(b) is designed "to prohibit a plaintiff from unilaterally imposing upon the court, the parties and society enormous social and economic costs absent some factual basis." *Semegen*, 780 F.2d

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[6/] *E.g.*, Edward Brodsky, *Suits Resulting From the Banking Crisis*, N.Y.L.J., July 30, 1992.

[7/] *See, e.g.*, *Cosmas* v. *Hassett*, 886 F.2d 8, 11 (2d Cir. 1989); *New England Data Servs., Inc.* v. *Becher*, 829 F.2d 286, 289 (1st Cir. 1987); *DiVittorio* v. *Equidyne Extractive Indus. Inc.*, 822 F.2d 1242, 1247 (2d Cir. 1987); *Semegen* v. *Weidner*, 780 F.2d 727, 731 (9th Cir. 1985); *Seville Indus. Machinery Corp.* v. *Southmost Machinery Corp.*, 742 F.2d 786, 791 (3d Cir. 1984), *cert. denied*, 469 U.S. 1211 (1985).

at 731.[8] As the court noted in *Beck* v. *Cantor, Fitzgerald & Co., Inc.*, 621 F. Supp. 1547, 1552-53 (N.D. Ill. 1985), if plaintiff

> does not presently possess the relevant, indispensable facts to state a fraud claim with particularity, the precepts upon which Rules 9(b) and 11 are founded mandate that he has no business charging a party with fraud on the slim hope that he may use the various and expensive tools of discovery available under the Federal Rules to put meat on the bare bones of his fraud claim. Fraud is too serious a charge, and litigation is too expensive, to allow such tactics . . . .

Under the Rule 9(b) standard articulated in this case, a plaintiff may proceed with discovery on the basis of purely speculative allegations of fraud in the hope of discovering facts to justify the fraud charges leveled against defendants. The Third Circuit's Rule 9(b) standard as enunciated in *Shapiro* is tantamount to the issuance of a license for a "'fishing expedition' in uncharted waters." *Wayne Inv., Inc.* v. *Gulf Oil Corp.*, 739 F.2d 11, 14 (1st Cir. 1984). Indeed, it conflicts with the policy of Rule 11, which requires that the plaintiff and his or her counsel have a reasonable basis for asserting that the allegations are "well-grounded in fact . . . ." before filing suit.[9]

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[8] *Accord Segal* v. *Gordon*, 467 F.2d 602, 607-08 (2d Cir. 1972)("[a] complaint alleging fraud should be filed only after a wrong is reasonably believed to have occurred; it should serve to seek redress for a wrong, not to find one"); *Denny* v. *Barber*, 73 F.R.D. 6, 10, *aff'd*, 576 F.2d 465 (2d Cir. 1978)("[c]omplaints should not be conceived merely as tokens, guaranteeing access to a world of discovery. . . . Neither plaintiff nor his counsel are entitled to roam through a defendant's files at the mere drop of a 'complaint'"); *McFarland* v. *Memorex Corp.*, 493 F. Supp. 631, 639 (N.D. Cal. 1980) ("[d]iscovery allows parties to develop the facts underlying their claims and defenses; it is not a vehicle for uncovering the claims themselves").

[9] *See Cooter & Gell* v. *Hartmarx Corp.*, 110 S. Ct. 2447, 2454 (1990); *see also* Fed. R. Civ. P. 11 Advisory Committee's Note, 1983 amendment.

Allegations of what Judge Friendly aptly termed "fraud by hindsight"[10] are easily made without significant factual basis. In consequence, the Courts of Appeals for the First, Second and Seventh Circuits have required strict compliance with Rule 9(b).[11] Even where facts pertaining to the alleged fraud are "peculiarly within a defendant's knowledge," most courts have required plaintiffs pleading fraud upon information and belief to allege specific facts upon which their belief is founded.[12] Even the Third Circuit, until the decision below, required that plaintiffs claiming that the facts were within the defendants' control set forth in the complaint "a statement of the facts upon which the allegations are based." *In re Craftmatic Sec. Litig.* v. *Kraftsow*, 890 F.2d 628, 645 (3d Cir. 1989); *see also Christidis* v. *First Pennsylvania Mortgage Trust*, 717 F.2d 96, 99–100 (3d Cir. 1983).

Although the court in *Shapiro* acknowledged *Craftmatic*'s requirement that allegations of fraud must be accompanied by factual support, it nevertheless undercut this requirement. It indicated that a plaintiff may avoid dismissal by alleging only that facts necessary to support an allegation of fraud are in the exclusive possession of the defendants and delineating the nature and scope of plaintiff's efforts to uncover those facts. *Shapiro*, 964 F. 2d at 285. This view would allow a plaintiff to prosecute a securities fraud claim, despite the absence of any facts demonstrating "how" the alleged misconduct departed from proper conduct or "how" the alleged misstatement was inaccurate, merely by stating in the complaint that the plaintiff was unable to discover facts supporting the claim prior to filing the action.

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[10] *Denny*, 576 F.2d at 470.

[11] *See Romani*, 929 F.2d at 878; *DiLeo*, 901 F.2d at 627; *Denny*, 576 F.2d at 470.

[12] *See Romani*, 929 F.2d at 878; *Craighead* v. *E.F. Hutton & Co.*, 899 F.2d 485, 489-90 (6th Cir. 1990); *Moore* v. *Kayport Package Express, Inc.*, 885 F.2d 531, 540 (9th Cir. 1989); *DiVittorio*, 822 F.2d at 1248; *Wayne Inv.*, 739 F.2d at 13-14; *Schlick* v. *Penn-Dixie Cement Corp.*, 507 F.2d 374, 379 (2d Cir. 1974), *cert. denied*, 421 U.S. 976 (1975); 5 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure: Civil 2d* § 1298 at 650-660 (1990); 2A James W. Moore & Jo D. Lucas, *Moore's Federal Practice* ¶ 9.03[1] at 9–28 (1991).

The view adopted below is inconsistent not only with the views of other circuits, but with a recent opinion of another Third Circuit panel. On the same day that *Shapiro* was decided, another panel affirmed a judgment which reached an opposite and irreconcilable conclusion on the appropriate standard for pleading fraud under Rule 9(b). *Decker* v. *Landmark Sav. Ass'n*, No. 91-3776 (3d Cir. May 20, 1992). On a very similar set of facts, the *Landmark* panel reaffirmed the requirement that plaintiffs plead facts identifying "how" alleged misstatements were false and "why" defendants would have been on notice of their falsity. *Landmark* is consistent with previously-stated Third Circuit standards[13/] and with the pleading standards adopted by other circuits.

Shapiro thus conflicts with decisions in the First,[14/] Second[15/] and Seventh[16/] Circuits,[17/] as well as the decision of another Third Circuit panel. Certiorari therefore should be granted.[18/]

[13/] *See Christidis*, 717 F.2d at 99–100; *In re Craftmatic*, 890 F.2d at 645–46.

[14/] *Romani* v. *Shearson Lehman Hutton*, 929 F.2d 875, 878 (1st Cir. 1991).

[15/] *Denny* v. *Barber*, 576 F.2d 465, 469–70 (2d Cir. 1978).

[16/] *DiLeo* v. *Ernst & Young*, 901 F.2d 624, 627–28 (7th Cir.), *cert. denied*, 111 S. Ct. 347 (1990).

[17/] Insofar as it does not require a plaintiff to support allegations of fraud with a statement of facts upon which such allegations are based, or to plead fraud with any degree of particularity, the Third Circuit's decision in *Shapiro* diverges from the decisions of other circuits which have considered the issue. *See, e.g.*, *Hoover* v. *Langston Equipment Assocs. Inc.*, 958 F.2d 742, 745 (6th Cir. 1992); *Farlow* v. *Peat Marwick, Mitchell & Co.*, 956 F.2d 982, 986–87 (10th Cir. 1992); *Whalen* v. *Carter*, 954 F.2d 1087, 1097–98 (5th Cir. 1992); *Guidry* v. *Bank of LaPlace*, 954 F.2d 278, 288 (5th Cir. 1992); *Craighead* v. *E. F. Hutton & Co.*, 899 F.2d 485, 489–90 (6th Cir. 1990); *Moore* v. *Kayport Package Express, Inc.*, 885 F.2d 531, 540 (9th Cir. 1989).

[18/] Certiorari should be granted also pursuant to Sup. Ct. R. 10.1.(c). The Third Circuit's statement in *Shapiro*—that "[b]y addressing the quality of a particular management practice, a defendant declares the subject of its

(continued...)

II.

REVIEW SHOULD BE GRANTED BECAUSE OF THE IMMEDIATE IMPORTANCE OF THE STANDARD FOR PLEADING FRAUD TO THE FUNCTIONING OF THE CAPITAL MARKETS

It is essential that the Court prevent the development of a rule exposing banks, other issuers, and securities underwriters to costly litigation every time their business or, in the case of underwriters, the business of an issuer whose securities they have underwritten, declines. The federal "[s]ecurities laws do not guarantee sound business practices and do not protect investors against reverses." *DiLeo*, 901 F.2d at 627. Absent some requirement that plaintiffs do more than allege in conclusory fashion that defendants' conduct or statements constitute fraud, the securities laws become nothing more than an *in terrorem* weapon to coerce settlements, a form of insurance policy tending to place the shareholder in a "no lose" situation. *See Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 741 (1975).

This tendency is greatly magnified by the potential for abuse of the liberal discovery provisions of the Federal Rules of Civil Procedure. "[E]ven a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial so long as he may prevent the suit from being resolved against him by dismissal or summary judgment." *Blue Chip*, 421 U.S. at 740.

> [T]he mere existence of an unresolved lawsuit has settlement value to the plaintiff not only because of the possibility that he may prevail on the merits, an entirely legitimate component of settlement value, but because of the threat of extensive discovery and disruption of normal business activities which may accompany a law-

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[12/](...continued)
representation to be material to the reasonable shareholder, and thus is bound to speak truthfully" (964 F.2d at 282)—takes an approach expressly rejected by this Court in *Basic, Inc.* v. *Levinson*, 485 U.S. 224 (1988).

> suit which is groundless in any event, but cannot be proved so before trial.

Id. at 742–43.

Extensive depositions of the defendant officers and associates, and far reaching discovery of business documents, are common and costly occurrences in securities litigation today. Rule 9(b) thus operates to diminish the possibility that a plaintiff with a groundless claim will be permitted to conduct extensive, expensive and time consuming discovery "with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the process will reveal relevant evidence. . . ." *Blue Chip*, 421 U.S. at 741. It functions to prohibit a plaintiff from unilaterally imposing upon the defendant, the court and society enormous social and economic costs absent a sufficient factual basis to which counsel is willing to attest under Rule 11.

The cost of too permissive a standard for stating a securities fraud claim goes well beyond the expense of discovery and a motion for summary judgment or trial. Defendants in such actions, as in others, constantly must decide whether to litigate to judgment or settle. The magnitude of potential class action liability under the securities laws, particularly since the acceptance of the fraud on the market theory,[19] is enormous, often so great as to threaten the continued health or existence of the company sued. Accordingly, the vast majority of these cases are settled before trial, frequently in spite of the defendants' confidence in their ability to prevail at trial, because even a small risk of an adverse result is too great to bear. Indeed, recent empirical research confirms that the settlement process in such cases often is divorced from expected trial outcomes because the sheer magnitude of the exposure leaves the defendants without practical access to an adjudicated resolution.[20]

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[19] *Basic*, 485 U.S. 224 (1988).

[20] Janet C. Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 Stan. L. Rev. 497, 500 (1991).

In these circumstances, the importance of the standard applied to determine the sufficiency of a securities fraud complaint cannot be gainsaid. Since the denial of a motion to dismiss the complaint effectively subjects the defendants to the substantial cost of far reaching discovery, and in many cases can deprive them of the opportunity to defend on the merits except by running extraordinary risks, the standard has a profound impact on the outcomes of such cases. These are outcomes, moreover, that go far beyond the private interests of the immediate parties. Since securities fraud actions reflect private enforcement of important public regulatory policies, there is a substantial public interest in ensuring that the outcomes reached fairly reflect the merits.[21/] And there is no public interest served by the *Shapiro* rule, which will subject securities market participants to potentially debilitating costs as the result of normal business reverses where there are no facts suggestive of fraud. Increased risks associated with public offerings in turn will raise the level of compensation required by underwriters assuming such risks and thus will operate to limit access to the capital markets. One well might expect fewer companies to consider raising capital by going public.[22/]

To say that underwriters can avoid these costs through increased disclosure is to ignore the practical realities of the situation. Even if it were possible to eliminate all risk of "fraud by hindsight" securities litigation through enhanced disclosure, such disclosure would not be without cost. Cost aside, moreover, even the most extensive disclosure would not eliminate the risks associated with such litigation because so many of the allegations leveled relate to the correctness of inherently subjective business judgments. In this case, for example, the complaint attacks loan loss reserves, which in the best of circumstances are merely estimates of future losses that are not susceptible of objective verification.[23/]

[21/] Alexander, *supra*, at 501.

[22/] *See* Alexander, *supra*, at 571.

[23/] *See Christidis*, 717 F.2d at 100 ("reserves were estimates or predictions of the likely collection or liquidation experience ... in the future"); *TCF Banking & Sav. F.A.* v. *Arthur Young & Co.*, 706 F. Supp. 1408, 1412 (D. Minn. 1988) (establishment of loan loss reserve "involves economic forecasting, not the reporting of known facts").

As the Court of Appeals for the Seventh Circuit stated in *DiLeo* v. *Ernst & Young*, "[s]ecurities laws designed to protect investors' interests should not be read to increase the costs of ordinary business and so disserve their own ends." *DiLeo*, 901 F.2d at 627. If the standard for pleading fraud set forth in *Shapiro* were deemed sufficient, "the advent of a recession could be expected to trigger a multitude of complaints in which plaintiffs seek to impose liability for their financial disappointments based on entirely fabricated scenarios of fraud." *Romani*, 929 F.2d at 880. Under *Shapiro*, no matter how improbable the allegations of a plaintiff, a case alleging securities fraud would be virtually impossible to dispose of prior to extensive discovery other than through the settlement process. The Rule 9(b) standard currently employed in the First, Second and Seventh Circuits, on the other hand, would permit the dismissal, prior to trial, of those plaintiffs who seek to sue first and ask questions later. We therefore urge the Court to take review and reverse the decision of the Third Circuit.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the petition for certiorari be granted.

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Respectfully submitted,

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